IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO.1328 OF 1988

Ramniklal Shankarlal Shah, a sole
proprietor of M/s.S.J.Shah & Sons,
residing at A-4, Pariwar Housing Society,
Dadabhai Road, Andheri (West),
Bombay-58. .. Petitioner

v/s.

1. Union of India, Ministry of Finance,
Department of Revenue, Aayakar
Bhavan Annexe, New Marine Lines,
Bombay-20.

2. Collector of Central Excise,
Bombay II, having his office at
Piramal Chambers, 9th Floor,
Jijibhoy Lane, Lalbaug,
Bombay-400 012.

3. The Superintendent of Central
Excise. Range-VI, Division-R,
having his office at C/o.India
Plastic Ltd., Kandivli (West),
Bombay-400 067. .. Respondents

Mr.S.N.Kantawala i/by Mr.R.V.Govilkar for the petitioner.

Mr.A.J.Rana, Senior Counsel with Ms.S.V.Bharucha for the respondents.

CORAM : R.M. LODHA &
J.P.DEVADHAR, JJ.

DATED : 14TH MARCH, 2006.

ORAL JUDGMENT (Per R.M.Lodha,J.)

The petitioner seeks to impugn the order in original dated 28th October, 1987 passed by the Collector of Central Excise, Bombay II (respondent No.2) as a consequence of the the adjudication proceedings carried out pursuant to the show-cause notice dated 20th February, 1986.

2. As a matter of sound discretion, the writ petition is liable to be dismissed on the sole ground of availability of alternative and efficacious remedy of appeal in challenging the order in original dated 28th October, 1987 under the Central Excise Act, 1944. There is nothing extraordinary in the matter that justifies the invocation of extraordinary remedy under Article 226 of the Constitution of India despite the availability of statutory appeal against the order in original dated 28th October, 1987. As a matter of fact, the impugned order itself records that an appeal lies with the Customs, Excise and Gold (Control) Appellate Tribunal in terms of section 35B of the Central Excise & Salt Act, 1944 and that the appeal may be filed within three months

from the date of communication of the order. In our view, therefore, the writ petition is liable to be dismissed on this ground alone.

3. However, since the writ petition pertains to the year 1988 and remained pending before this court for more than 17 years, we thought it fit to look into the merits of the matter as well.

4. The petitioner carries on manufacturing activities at the factory premises situated at 2-C & D, Government Industrial Estate, Kandivli (West), Bombay-67 as the sole proprietor of firm M/s.S.J.Shah & Sons. The petitioner is also the sole proprietor of another concern known as Chandan Industries (India). Both the concerns viz. M/s.S.J.Shah & Sons and M/s.Chandan Industries (India) operate from the same place. It is petitioner's case that he received an order from M/s.Nuclear Fuel Complex, Hyderabad for the supply of Extrusion dies. In order to determine the proper classification of the Extrusion dies and to ascertain the duty liability thereon, he approached the department and sought its guidance. It is his case that he was already manufacturing excisable goods through his concern M/s.S.J. Shah & Sons which was also registered as a small-scale industry. The petitioner has averred that he filed a classification list effective from 14th July, 1980 with the department which was

duly acknowledged by the Range Superintendent of Central Excise on 22.7.1980. In the said classification list, the petitioner claimed that the goods manufactured by him were covered under Tariff Item 68. On 26.6.1981, the petitioner filed the declaration dated 28.5.1981 under the notification No.111/78-CE dated 9th May, 1978 to the department claiming exemption from licensing control in respect of the financial year 1981-82. It is the petitioner's case that alongwith the said declaration, he submitted the detailed statement of value of clearances (invoice-wise and item-wise) duly certified by the chartered accountant made during the preceding financial year 1980-81. The said statement included the value of clearances made by his both concerns viz. M/s.S.J.Shah & Sons and M/s.Chandan Industries (India). The declaration made by the petitioner was accepted and the concerned Range Superintendent of Central Excise granted him exemption from licensing control vide letter dated 26th June, 1981. The petitioner applied for Central Excise L-4 licence on 6.7.1981 and the respondent No.3 issued the L-4 licence dated 16th July, 1981 to the petitioner in the name of M/s.S.J. Shah & Sons for the manufacture of excisable goods. For the financial year 1982-83, the petitioner claims to have filed declaration on 16.6.1982 under the notification No.111/78-CE dated 9th May, 1978 and the petitioner is said to have been granted exemption from the licencing control for the financial

year 1982-83 as well.

5. The petitioner has admitted in the writ petition that in respect of the Extrusion dies cleared by him in the name of M/s.Chandan Industries to M/s.Nuclear Fuel Complex, Hyderabad, the enquiry was commenced in November, 1981 and the petitioner was issued summons from time to time. The enquiry was instituted since the extrusion dies were covered by Tariff Item 51A but the petitioner classified them under Tariff Item 68. It appears that despite reminders after reminders when the petitioner did not furnish the complete information in the enquiry, the Collector of Central Excise (respondent No.2) was constrained to issue show-cause notice dated 20th February, 1986 to the petitioner on the ground of violation of Rules 174, 173B, 173C, 173F, 173G(1) read with 9(1), 173G(2) read with 52A, 173G(4) read with 226 of the Central Excise Rules, 1946. The notice to show-cause dated 20th February, 1986 reads thus-

: NOTICE TO SHOW CAUSE :

> WHEREAS it appears that Shri RAMNIKLAL SHANKARLAL SHAH, (hereinafter referred as R.S.Shah) Proprietor of M/s.Chandan Industries, M/s.S.J.Shah & Sons and M/s.Cast Fab Industries, having his office at Goumukh Bhavan, Masjid Bunder Road, Bombay-400 009, and factory at Plot No: 2CD, G.I.Estate, Kandivli (W), Bombay-400 067, has contravened the provisions of Section 6 of the Central Excise and Salt Act, 1944, read with rule 174 of the Central Excise Rules, 1944, rule 173B, rule 173C, rule 173F,

rule 173G(1) read with rule 9(1), rule 173G(2) read with rule 52A, rule 173G(4) read with rule 53 and rule 226 of Central Excise Rules, 1944, in as much as he manufactured and cleared excisable goods falling under Tariff item No.51A, and Tariff Item No.68, during the period January, 1980 to December 1984, without payment of Central Excise duty by suppressing the fact of manufacture and removal of the said excisable goods with intention to evade payment of duty, and also:

(a) without applying for and obtaining a Central Excise Licence in Form L-4, for the Manufacture of `tools' and `miscellaneous goods' falling under T.I.51A and T.I.68, respectively of the Central Excise Tariff as required under rule 174 ibid.

(b) without filing a classification list as required under rule 173B ibid:

(c) without filing the price lists as required under rule 173C ibid:

(d) without determining the appropriate Central Excise duty on the said T.I.51A and T.I.68 goods, prior to the removal of the said goods as required under Rule 173F ibid:

(e) without payment of the proper Central Excise duty by debit entry in the PLA, prior to the removal of the said goods, from the factory as required under rule 173G(1) read with rule 9(1) ibid:

(f) without the cover of valid Central Excise transport documents viz., Gate pases, in Form G.P.1, for transport of the said goods as required under rule 173G(2), read with rule 52A ibid:

(g) without accounting the said goods in the prescribed R.G.1 register as required under rule 173G(4) read

with rule 226 ibid:

(h) without declaring the names of the other three firms viz.M/s.Chandan Industries, M/s.S.J.Shah and Sons and M/s.Cast Fab Industries, who are also functioning from the same premises under his proprietorship.

AND WHEREAS, the exact amount of duty evaded by Shri R.S.Shah during the aforesaid period is not ascertainable for want of relevant information to be submitted by the said Shri R.S.Shah.

The said Shri R.S.Shah is hereby required to show cause to the Collector of Central Excise, Bombay.II, having his office at 9th floor, Piramal Chambers, Lalbaug, Parel, Bombay 400 012 as to why:

(1) Central Excise duty evaded in respect of T.I.51A and T.I.68 goods manufactured and removed during the aforesaid period subject to the limit of 5 years and also thereafter, if any, should not be demanded and recovered from him under rule 9(2) of Central Excise Rules, 1944, read with proviso to subsection 1 of section IIA of the Central Excises and Salt Act, 1944:

(2) Penalty should not be imposed on him under rule 173Q(1) read with rule 52A and rule 226 ibid:

(3) an order should not be passed for confiscation of land, building, plant and machinery and materials used in connection with the manufacturer, storage and removals of the aforesaid T.I.51A and T.I.68 goods under clause (2) of rule 173Q ibid:

Shri R.S.Shah, should also indicate in his written explanation whether he wishes to be heard in person before the case is adjudicated.

He is further directed to produce at the time of showing cause all the evidence upon which he intends to rely in support of his defence.

If no cause is shown against the action proposed to be taken within one month of the receipt of this notice and the addendum to the notice to be issued or if he does not appear before the adjudicating authority when the case is posted for hearing the cause will be decided on the basis of evidence on record.

The amount of duty will be quantified as soon as the information regarding manufacture and clearances is submitted by Shri R.S.Shah.

This notice is issued without prejudice to any other action that may be taken against the aforesaid Shri R.S.Shah under the Central Excise Law or any other law for the time being in force.

The basis for the proposed action is as set out in annexure to this show cause notices.

The department intends to rely upon the below mentioned documents and records for the purposes of these proceedings. The department also intends to rely upon additional documents and records which may be obtained in the course of further enquiry.

1. Statements of Shri R.S.Shah, dated 3.11.1982, 7.11.1983, 25.5.1985, 12.8.85 and 6.11.1985.

2. Letters from M/s.Chandan Industries:

(a) dated 18.1.83, addressed to Inspr.C.x. (P&I) Br.Da.VIII/`R'.

(b) dated 19.9.83, addressed to Supdt.(P&I) C.EX.Dn.VIII/`R”

(c) dated 19.8.85, with enclosures addressed to Supdt.(P&I) Dn.VIII.

(d) dated 29.8.85, with enclosures addressed to Supdt. (P&I) Dn.VIII.

(e) dated 14.10.85 addressed to A.C.C.Ex.Dn.VIII:

3. Declaration under Notfn.No.111/78 for the year 1982-83, filed by M/s.S.J.Shah & Sons.

4. Licence No:16/OGNES/81 in the name of M/s.S.J.Shah & Sons:

5. Letters from Joint Director, P&S/Vig.Department of Atomic Energy,

(a) dated 8.8.1985 addressed to Supdt.C.Ex.(P&I) Dn.VIII and

(b) dated 22.8.1985 addressed to A.C.C.Ex.Dn.VIII

(SURJIT SINGH)
(COLLECTOR OF CENTRAL EXCISE)
BOMBAY II"

6. It was mentioned in the annexure annexed with the show-cause notice that the approximate duty liability for the year 1980-81 (8.10.80 to 27.1.1981) works out to Rs.2,14,563.54 at 15% basic and 5% special excise in respect of T.I.51A goods.

7. The petitioner submitted his replies on 19.4.86, 21.11.86

and 24.2.87. The Collector, Central Excise called upon the petitioner for personal hearing and by the impugned order dated 28.10.1987 ordered the petitioner to pay duty amounting to Rs.2,35,022.80 under Rule 9(2) of the Central Excise Rules, 1944 read with proviso to sub-section (1) of section 11A of the Central Excises and Salt Act, 1944. The Collector of Central Excise also imposed penalty of Rs.5,00,000/- as the petitioner was found to have resorted to forgery and fraudulent practices and also ordered confiscation of plant and machinery as the duty recoverable on the excisable goods exceeded Rs.1,00,000/- but gave option to the petitioner to pay a fine of Rs.1,00,000/- in lieu of confiscation of the plant and machinery.

8. The learned counsel for the petitioner submitted that there was no fraud perpetuated by the petitioner upon the revenue and that there was genuine mistake on the part of the petitioner in getting clearances of the excisable goods manufactured by its firm M/s.S.J. Shah & Sons under Tariff Item 68. He submitted that the extended period could not have been invoked by the department as there was neither fraud nor intent to evade payment of duty on the part of the petitioner. Relying upon the judgment of the Apex Court in the case of Tamil Nadu Housing Board v. Collector of Central Excise, Madras, 1994(74)E.L.T.9, the learned counsel submitted that the burden to prove fraud

and the intent to evade payment of duty lay on the department which they failed to discharge and, therefore, the limitation for extended period could not have been invoked. The learned counsel also relied upon the judgment of the Supreme Court in the case of Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay, 1995(78) E.L.T.401. The learned counsel also pointed out the defect in the show-cause notice in asmuch as, according to him, no specific amount was mentioned and, rather, it was stated in the notice that the exact duty evaded since 1.4.1980 shall be worked out in due course and the same shall be shown in the addendum.

9. We considered the submissions of the learned counsel for the petitioner.

10. As a matter of fact, it was not in dispute before us that the Extrusion dies were excisable goods and covered by Item 51A of the Central Excise Tariff and not Item 68. It was also not disputed before us that the petitioner recovered the excise duty on the said goods from his customer viz. M/s.Nuclear Fuel Complex as if the goods were covered under Item 68 of the Central Excise Tariff. From the impugned order, it further transpires (and to this factual aspect, there is not much dispute and it could not have been in the writ petition before us) that

the petitioner misused the gate passes which were authenticated by the Central Excise Department for its manufacturing unit M/s.S.J.Shah & Sons when it was under licencing control. That those gate passes were issued in the name of M/s.Chandan Industries (another sole proprietorship concern of the petitioner) is noticed in the impugned order. It, obviously, was done with deliberate intention to indicate that the duty of excise was paid by the manufacturer so that no doubt could arise in the mind of the customer. In the order in original, it is also observed that the petitioner would use obsolete gate passes of a different manufacturing unit with ulterior motive to recover duty from his customers when it was not actually paid by him to the Central Excise Department. The petitioner admitted this fact before the Collector, Central Excise. However, his explanation was that the Central Excise Duty was recovered as a precautionary measure in the belief that he would be required to discharge duty liability at the subsequent stage. This admission clearly shows the conduct of the petitioner and his ulterior motive to recover the duty from the customers when it was not actually paid.

11. Yet another reason submitted by the petitioner for collecting the Central Excise duty from his customers is that he had to pay Central Excise duty to his sub-contractors from

whom he was getting goods manufactured. The learned counsel could not point out any evidence to that effect. The petitioner before the authority admitted that he did not inform the department regarding the calculation of duty from the customer. The Collector, Central Excise in his order recorded that on enquiry with M/s.Nuclear Fuel Complex, Hyderabad, it was revealed that the petitioner had supplied the excisable goods valued at Rs.36,28,474/- and had recovered Central Excise duty to the tune of Rs.2,55,119.25 from them alone. The names of other customers to whom excisable goods were supplied by the petitioner were not disclosed. If this is not fraud with intention to evade excise duty then what else it is. The facts that came on record before the Collector of Central Excise showed that there was suppression and fraud on the part of the petitioner and also intent to evade payment of duty. In these facts, the Collector of Central Excise cannot be said to have erred in invoking limitation for extended period. The judgments of the Supreme Court in the cases of Tamil Nadu Housing Board and Pushpam Pharmaceuticals Company, relied upon by the learned counsel for the petitioner, do not help in the light of the facts that we have indicated above.

12. It is pertinent to note that though the petitioner sought to claim exemption from the licencing control under notification

No.111/78-CE dated 9.5.1978 read with notification No.2/81 dated 17.1.1981, while claiming exemption from the licencing control, he did not submit his licence for cancellation but retained the same with him for which no reason was disclosed to the authority. The Collector of Central Excise found that no declaration in terms of notification No.2/81 dated 17.1.1981 for availment of exemption from licencing control for subsequent financial years 1983-84 and 1984-85 was filed by the petitioner nor the licence in his possession was got renewed for subsequent period by him. In this backdrop, the contention of the learned counsel for the petitioner that even if the excisable goods manufactured by the petitioner were covered by Item 51A of the Central Excise Tariff and that the clearance of the said goods by him under Item 68 of the Central Excise Tariff was erroneous, yet, the petitioner was entitled to exemption from licencing control is wholly misconceived and, in any case, this grievance cannot be entertained in extraordinary jurisdiction under Article 226 of the Constitution of India. In the backdrop of the conduct of the petitioner, he is not entitled to invocation of extraordinary jurisdiction. Writ petition is dismissed with costs which we quantify at Rs.5,000/-.

13. We are informed that in view of the stay order passed by the learned Single Judge on 28.4.1988, no payment as per the

impugned order dated 28.10.1987 towards duty and penalty has been made. We order that if the petitioner fails to comply with the order dated 28.10.1987 within two months from today, he shall be liable to pay simple interest at the rate of 6% per annum on the due amount from the date of the order dated 28.10.1987 until realisation.

(R.M.LODHA, J.)

(J.P.DEVADHAR, J.)